No. 03-500

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REPUBLIC OF AUSTRIA AND ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Petitioners,

v.

DORIT WHITEMAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER THE FSIA'S COMMERCIAL-ACTIVITY EXCEPTION CAN BE APPLIED RETROACTIVELY.

By granting the petition for certiorari in *Altmann* v. *Republic of Austria*, 317 F.3d 954 (CA9 2002), *cert. granted*, 124 S.Ct. 46 (2003) (No. 03-13), the Court recognized that retrospective application of the expropriation exception of the FSIA presents an important question that warrants review. 28 U.S.C. §1605(a)(3). This case presents the same core retroactivity question in a broader context that involves not

only the expropriation exception, but also the commercial-activity exception that is at the heart of the split among the circuits.[1] *Compare Joo* v. *Japan*, 332 F.3d 679, 687 (CADC 2003) (holding that the commercial-activity exception cannot be applied retroactively); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (CA2 1988) (*per curiam*) (same); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (CA11 1986) (same), *with Whiteman* v. *Republic of Austria/Garb* v. *Republic of Poland*, Pet. App. 1a (requiring factual inquiry into Austria and Poland's immunity from suits alleging commercial-activity exceptions); *Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (CA2 2003) (same regarding France), *petition for cert. filed*, 72 U.S.L.W. 3154 (U.S. Aug. 19, 2003) (No. 03-284); *cf. Altmann*, 317 F.3d, at 967 (distinguishing commercial activity from the expropriations in that case).

Whether the FSIA exceptions can be applied to events occurring when the United States recognized no exceptions to foreign-sovereign immunity is an issue of great consequence to the United States's present relations with foreign nations. *See* U.S. *Altmann* Amicus Br. 1. Because this case involves a broader application of the retroactivity issue than the one presented in *Altmann*, the Court should grant this petition to ensure that the Republic of Austria and its instrumentalities—indeed all foreign sovereigns—have the benefit of consistent statements of United States law on that significant question. *See* Japan *Altmann* Amicus Br. 1-3; Mexico *Altmann* Amicus Br. 1-2; Societe Nationale des Chemins de Fer Francais *Altmann* Amicus Br. 1. At a minimum, the Court should hold this petition until it resolves *Altmann*. *See* U.S. *Altmann* Amicus Br. 20 n.15.[2]

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[1] *See* Br. Opp'n 2 ("[The commercial-activity exception] is a principal predicate for the complaint herein.").

[2] This reply focuses on the legal issues relevant to the petition and does not attempt to address each of respondents' baseless allegations and

Contrary to respondents' suggestion, the Court should review the court of appeals's holding now, because the Second Circuit has conclusively adopted a fact-intensive approach and Austria seeks review of the propriety of that legal test. The factual inquiry contemplated in the Second Circuit's remand imposes a burden that effectively strips Austria of the very protections that immunity from suit provides. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 525-26 (1985). An ad hoc retroactivity analysis deprives foreign states of the benefits of immunity from litigation, as illustrated by the ongoing litigation burdens imposed on Austria, France, and Poland under the Second and Ninth Circuits' recent holdings. *See Whiteman/Garb*, App. 1a; *Abrams*, 332 F.3d, at 186-88; *Altmann*, 317 F.3d, at 954.

A. The United States Recognized No Exceptions to Absolute Foreign-Sovereign Immunity Before 1952.

No exception to foreign-sovereign immunity existed prior to the issuance of the Tate Letter in 1952, and retrospective application of either the commercial-activity or the expropriation exception should be equally precluded by the strong presumption against retroactivity. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951-52 (1997) (holding that a statute that "*creates* jurisdiction where none previously existed . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well" and, therefore, triggers the presumption against retroactivity).

As the Tate Letter itself makes clear, the commercial-activity exception to foreign-sovereign immunity came into

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polemic accusations against the Republic of Austria, the Austrian government, and the Austrian people as a whole. Those attacks are unfounded and immaterial to whether the petition should be granted.

being only with the adoption of the restrictive theory in 1952. The commercial-activity exception was the only exception to absolute immunity reflected in the restrictive theory, which was motivated by immune sovereigns' involvement in commercial activity:

> "[T]he widespread and increasing practice on the part of governments of engaging in commercial activities *makes necessary* a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons *it will hereafter be* the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 714 (1976) (emphasis added) (reprinting Letter from Jack B. Tate, Acting Legal Advisor of the State Dep't, to Acting Attorney General Philip B. Perlman, dated May 19, 1952); *accord Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

Prior to that letter, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S., at 486.

Ignoring history and this Court's precedent, respondents erroneously assert that *Bank of the United States* v. *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824), established the commercial-activity exception to foreign-sovereign immunity in 1824. *Planters' Bank*, however, merely held that Georgia's noncontrolling interest in an otherwise privately held defendant bank did not render a suit against the bank a suit against the State. *Id.* at 908. *Planters' Bank* did not inject the commercial-activity exception into America's foreign-sovereign-immunity law, as the Court made clear in *Berrizi Bros.* v. *The S.S. Pesaro*, 271 U.S. 562, 574 (1926) (affirming the rejection of a prior court's ruling, relying on

Planters' Bank, that an Italian merchant ship was not entitled to sovereign immunity).[3]

At most, cases like *Planters' Bank* and *The Pesaro* foreshadowed the conceptual difficulties of reconciling absolute sovereign immunity with the reality that governments and government-owned entities sometimes engage in activities that are not consonant with sovereignty-based immunity. It was the dramatic upsurge of this phenomenon in the twentieth century that motivated both the development of the restrictive theory in other nations' courts and the State Department's adoption of that theory in 1952. *See* Tate Letter, *Alfred Dunhill*, 425 U.S., at 714; *accord* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36-37 (1978). It is clear from the historical record, as examined in the Court's precedent, that United States foreign-sovereign-immunity law recognized no exceptions until the Tate Letter issued. *E.g.*, *Verlinden*, 461 U.S., at 487; *accord* von Mehren, *supra*, at 41 ("[B]y the middle of the 1940's, the United States' attitude towards foreign sovereign immunity . . . had retained the absolute theory."). Therefore, Austria was entitled to absolute immunity at the time of the events underlying this case and *Altmann*.

B. This Case Illustrates the Difficulty and Uncertainty Inherent in the Second and Ninth Circuits' Ad Hoc Approaches to FSIA Retroactivity.

Respondents do not dispute that the expropriation exception to foreign-sovereign immunity did not exist before the FSIA. Their argument regarding that exception is confined to an attack on Austria's expectations of immunity that mirrors,

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[3] *See The Pesaro*, 13 F.2d 468, 469 (S.D.N.Y. 1926) (repudiating the decision in *The Pesaro*, 277 F. 473,483 (S.D.N.Y. 1921), which relied on *Planters' Bank* to hold that the Pesaro's commercial character stripped it of sovereign immunity).

in tone and content, the approach adopted by the Ninth Circuit in *Altmann*. Respondents' attack aptly illustrates the difficulties inherent in any ad hoc approach to foreign-sovereign immunity and the strain that subjecting foreign sovereigns to such uncertainty places on international relations. Indeed, it contradicts the United States's express and unequivocal position, supported by contemporaneous documentation, that it has always regarded Austria as a sovereign that had a settled expectation of immunity regarding conduct occurring before 1952. As the United States made clear, neither Austria's sovereignty—nor immunity—lapsed after the *Anschluss* or during the post-war Allied occupation. U.S. Letter Brief (May 2, 2003), *Whiteman/Garb*, Nos. 02-7844 and 02-9361, in the United States Court of Appeals for the Second Circuit, 4-10;[4] *see also* Pet. App. 68a-72a.

The diametrically opposed immunity conclusions drawn by respondents and the *Altmann* court, on the one hand, and the United States, on the other hand demonstrate the futility of attempting to resolve FSIA retroactivity on a case-by-case basis—even when analyzing the same mass of historical material. That inherent unpredictability results not only in judicial inconsistency, but also in intolerable uncertainty for

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[4] Respondents' theory that Austria ceased to exist as a *de facto* state after the German *Anschluss*, and, therefore, was not a sovereign during the Holocaust era, is entirely inconsistent with their theory that Austria may be held liable for acts of the Nazi Regime. *See* U.S. Letter Br. (May 2, 2003), at 10 ("[W]e note that even if plaintiffs could prove that the United States had, prior to the Moscow Declaration, definitely accorded *de jure* recognition to the Anschluss, it would not support the exercise of jurisdiction over plaintiffs' claims. If Austria ceased to exist as a state at the time of the Anschluss, then it could not be held directly liable for any of Germany's acts.") Moreover, respondents have consistently acknowledged, and do not dispute in their brief in opposition, that their only conceivable basis for jurisdiction over Austria is the FSIA, which applies solely to foreign states and their instrumentalities. *See* 28 U.S.C. §1603.

the Executive Branch in its diplomatic activities. For example, the General Settlement Fund (GSF) to comprehensively resolve outstanding restitution claims was negotiated by the United States and Austria in light of the previously well-settled understanding that foreign sovereigns were absolutely immune from private suit in United States courts during the World War II-era. *See* Pet. App. 49a-54a, 70a-72a; U.S. *Altmann* Amicus Br. 18. The GSF is consistent with the United States's longstanding policy to diplomatically resolve World War II-era claims on a government-to-government basis, *see Am. Ins. Ass'n* v. *Garamendi*, 123 S.Ct. 2374, 2390 (2003), rather than through individual restitution suits.[5]

Foreign sovereigns negotiating with the United States for the resolution of decades-old international grievances should not have to do so within an unpredictable sovereign-immunity structure that depends on the vagaries of whether contemporaneous documentation of Executive Branch views exists and the interpretation of such material by individual courts. Nor should foreign sovereigns' amenability to suit depend on the accident of which circuit's precedent governs their immunity defense. *See, e.g.*, *Joo*, 332 F.3d, at 687 (holding that the FSIA's commercial-activity exception cannot be applied retroactively to confer jurisdiction for claims arising from Imperial Japan's World War II-era conduct).

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[5] Respondents erroneously suggest that statements by the United States expressing an unwavering policy of undoing Nazi expropriations necessarily also signal an intent to deprive Austria of absolute immunity from private suits in United States courts. To the contrary, such statements underscore the Executive Branch's policy of resolving war-related claims through diplomacy, not abrogation of foreign sovereigns' immunity. *See Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1023-24 (CA9), *cert. denied.*, 124 S.Ct. 132-33 (2003).

II. THE COURT SHOULD RESOLVE THE THRESHOLD POLITICAL-QUESTION ISSUES RAISED BY THIS CASE.

The recent proliferation of World War II-era suits against foreign sovereigns also raises significant justiciability concerns that warrant the Court's attention and are squarely presented by this case. Justiciability, like jurisdiction, is a threshold issue, *United States* v. *Sperry Corp.*, 493 U.S. 52, 66 (1989), and should be decided at the earliest stage of the proceedings. The Court should grant the petition to clarify that suits involving war-related restitution claims present nonjusticiable political questions and must be dismissed.

As illustrated by respondents' diatribe against the Austrian government, Austria's politicians, and Austria's internal and international diplomatic efforts to resolve the restitution issue—including the United States-supported GSF—an ad hoc approach to immunity is fraught with political questions. Recognition of foreign sovereigns is entrusted to the Executive Branch and is outside the competence of the courts. *See Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-38 (1938). Similarly, claims raising successor responsibility of a foreign sovereign, like the alleged responsibility of the present-day Austrian government for acts of the German Nazi Regime, are nonjusticiable. *767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 160-61 (CA2 2000).

This case presents the additional unique circumstance of directly interfering with the implementation of the GSF—Austrian legislation that resulted from an international agreement that the Executive Branch expressly endorses as the exclusive remedy for redress of respondents' claims. *Cf. Garamendi*, 123 U.S., at 2390 ("The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy . . . and . . . securing private interests is an express

object of diplomacy today."); Pet. App. 47a. To prevent further disruption of international diplomatic efforts to resolve war-related claims, the Court should grant the petition and confirm that private suits seeking broad restitution remedies for World War II-related conduct present nonjusticiable political questions.

CONCLUSION

The Court should grant the petition for writ of certiorari or, in the alternative, hold the petition pending resolution of *Altmann*.

Respectfully submitted,

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